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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

MARK ALLEN TICHELAAR,

Petitioner,

v.

THE SUPERIOR COURT OF ORANGE
COUNTY,

Respondent;

THE PEOPLE et al.,

Real Parties in Interest.

G041726

(Super. Ct. No. 09CF0232)

O P I N I O N

Original proceedings; petition for a writ of mandate to challenge an order of the Superior Court of Orange County, Vickie L. Hix, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Petition granted.

Joseph Dane for Petitioner.

No appearance for Respondent.

Edmund G. Brown, Jr., Attorney General, Alfredo Terrazas, Senior

Assistant Attorney General, Linda K. Schneider and Sherry Ledakis, Deputy Attorneys General, for Real Parties in Interest.

* * *

THE COURT:*

At the recommendation of the State Board of Chiropractic Examiners, made pursuant to Penal Code section 23, the trial court suspended petitioner Mark Allen Tichelaar's chiropractor's license during the pendency of the criminal proceeding against him. We will issue a writ of mandate directing the trial court to vacate that order as it was made without affording petitioner basic constitutional due process. (*Gray v. Superior Court* (2005) 125 Cal.App.4th 629, 641.)

I

Petitioner is a licensed chiropractor. He was arrested on February 9, 2009, following a sting operation and charged with four felony counts of grand theft and insurance fraud. (Pen. Code, §§ 487a & 550). Briefly stated, the district attorney's office created a fake law firm. The firm contacted petitioner and offered to split petitioner's professional fees for clients it referred. The criminal complaint alleges petitioner unlawfully split his professional fees and, when requested by the fake firm, falsified the number of times referred clients were treated. Petitioner was released the same day after posting bail in the amount of \$10,000. Arraignment was then scheduled for March 3, 2009.

On February 25, 2009, the State Board of Chiropractic Examiners filed a motion: "Notice of appearance and recommendation by State licensing agency re: restrictions on practice as chiropractor." It was expressly made pursuant to Penal Code section 23. The text of the motion recommended that the superior court impose as a condition of bail that petitioner be suspended from practicing as a chiropractor "during

* Before Sills, P. J., Rylaarsdam, J., and Moore, J.

the pendency of this criminal action. [¶] This Order is requested in the interest of justice and as a condition of any bail, or own recognizance release on the grounds that Defendant Tichelaar, if allowed to continue to practice as a chiropractor, poses a danger to the public health, safety and welfare.” The hearing on the Board’s motion was also set for March 3.

But on March 2, 2009, one day before the scheduled hearing date, the trial court signed the order requested by the Board. The order, filed the following day and presumably after the arraignment, provides that petitioner “is prohibited from practicing as a chiropractor, either directly, or indirectly, while on bail, or own recognizance release, for the duration of this criminal proceeding and until the completion of the disciplinary proceeding brought before the Board of Chiropractor [sic] Examiners, whichever concludes first.”

In his petition for writ of mandate, Tichelaar complains: (a) Penal Code section 23 only allows licensing boards limited authority to request conditions of probation, not bail; (b) the trial court cannot suspend a professional license as a condition of bail when bail has already been posted; and (c) the suspension order was issued in violation of Tichelaar’s due process rights. Although the Board of Chiropractic Examiners offers some limited rebuttal to the first two issues, it primarily focuses its opposition to the petition on the grounds that by law Tichelaar is not entitled to a predeprivation hearing, and in any event he received procedural due process because he was given adequate notice of the hearing and a fair opportunity to be heard before the suspension order issued.

At petitioner’s request, we issued a stay of the order. We later issued an alternative writ of mandate.

II

Penal Code section 23 provides that the Board of Chiropractic Examiners may furnish the trial court with “recommendations regarding specific conditions of

probation” as to a licensee charged in a criminal proceeding when “necessary to promote the interests of justice and protect the interests of the public” if those proceedings substantially relate “to the qualifications, functions, or duties of a licensee.” By its terms, this section appears limited to specific conditions of probation. Indeed, in *Gray* the appellate court held that, “The statute does not authorize a licensing agency to recommend bail conditions expressly, nor does it authorize a trial court to suspend a professional license upon the recommendation of a state licensing agency.” (*Gray v. Superior Court, supra*, 125 Cal.App.4th at p. 643.) In short, there seems to be no authority under Penal Code section 23 that would support the Board’s recommendation to suspend petitioner’s license as a bail condition.

The Board seeks to justify the suspension order by suggesting that in addition to recommendations concerning probation conditions, Penal Code section 23 expressly authorizes it to “provide any other assistance necessary to promote the interests of justice and protect the interests of the public.” Recommending the suspension of a chiropractor’s license as a bail condition is, the Board argues, nothing more than offering the trial court the “assistance” the statute allows. Although this argument avoids directly challenging the holding in *Gray*, it is clear from a close reading of the Board’s overall argument that it believes *Gray* was wrongly decided.

We need not address the vitality of the holding in *Gray*, however, first because both sides accede the trial court has the power to impose restrictions on a defendant chiropractor’s right to practice to protect the public safety pending resolution of a criminal proceeding, and second we conclude, as petitioner argues, there is a fundamental procedural due process problem with the order. Simply put, petitioner did not receive an adequate predeprivation hearing before the trial court suspended his license to practice.

An order suspending a defendant chiropractor’s license to practice upon the filing of a criminal complaint must comport with constitutional due process because,

once acquired, a chiropractor has a vested property right in the license. (Cf. *Smith v. Board of Medical Quality Assurance* (1988) 202 Cal.App.3d 316, 326 [physician has vested property right in license to practice].) Thus, before the trial court could suspend petitioner's right to practice, he had to be provided with adequate notice and a fair opportunity to be heard. (*Gray v. Superior Court*, *supra*, 125 Cal.App.4th at p. 641 [error to suspend medical license without affording defendant "prior notice, an evidentiary showing, or an opportunity to be heard"]; but see *Gilbert v. Homar* (1997) 520 U.S. 924, 933; *Federal Deposit Ins. Corp. v. Mallen* (1988) 486 U.S. 230, 241, 244-245 [predeprivation hearing not required in certain cases].) Here, the record includes a copy of the trial court's order. It is dated March 2, 2009, one day before the arraignment and the date scheduled for a hearing on the Board's recommendation. It is hard to conceive of a situation more unfair and lacking in procedural due process than one where the order is signed first and the hearing held second.

The Board of Chiropractic Examiners' asserts that here, unlike in *Gray*, adequate notice of the hearing was given and therefore Tichelaar was afforded due process. But merely giving notice is not enough. A licensee must actually receive a fair hearing. Given the Board does not dispute the fact that the order was signed the day before the hearing, we are puzzled as to why the Board initially argued so strenuously to uphold the trial court's order.¹ Whatever the reason, the Board is now willing to again make its case to the trial court.

III

After considering the petition and the arguments made in the invited

¹ Petitioner also complains the entire hearing was stacked because the district attorney's office released relevant information to the Board so it could file the recommendation but intentionally delayed releasing the same information to him until after the suspension order issued. We do not rely on that assertion in making our decision. It may, however, provide relevant backdrop to the trial court in any renewed hearing that seeks to impose licensing restrictions on petitioner.

informal response, we issued an alternative writ of mandate “directing respondent superior court to vacate and set aside its order signed by the court on March 2, 2009, and filed on March 3, 2009, prohibiting petitioner from practicing as a chiropractor for the duration of the criminal proceeding and until completion of the disciplinary proceeding brought before the Board of Chiropractor [sic] Examiners, and, if requested by the Board of Chiropractor [sic] Examiners, to hold a full hearing which affords petitioner due process and, among other things, considers all available less-restrictive alternatives” or to show cause before this court why such an order should not issue.

The Board initially advised us it intended to defend against the petition and the trial court, taking the cue, did not vacate the order. The Board has since filed a “notice of withdrawal of request to file answer.” Its notice adds that, “the Board will request a full hearing in the Superior Court which affords petitioner Tichelaar due process and considers all available less-restrictive alternatives.” We accept the Board’s notice of withdrawal that this court may grant the petition and issue a writ of mandate without the necessity of further briefing or oral argument. Accordingly, the petition for writ of mandate is granted.

IV

Let a writ of mandate issue commanding the trial court to set aside and vacate its order dated March 2, 2009, filed March 3, 2009, suspending petitioner Mark Allen Tichelaar’s license to practice as a chiropractor for the duration of the criminal proceeding.

We think it is important to note that nothing in this opinion prevents the Board from taking appropriate steps to request that the trial court impose less-restrictive alternatives than suspension on petitioner’s right to practice as a chiropractor pending resolution of the criminal proceeding. Similarly, in any subsequent hearing petitioner is not prevented from raising any argument that challenges the trial court’s power or decision to impose any less-restrictive alternatives.

The stay previously issued by this court is dissolved. Costs shall be awarded to petitioner.